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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

TYRONE ARMSTRONG,

Defendant and Appellant.

B206377

(Los Angeles County
Super. Ct. No. PA060387)

APPEAL from a judgment of the Superior Court of Los Angeles County, Alice C. Hill, Judge. Affirmed.

Kenneth J. Hutz, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Tyrone Armstrong appeals from the judgment entered following a jury trial which resulted in his conviction of the sale or transportation of cocaine (Health & Saf. Code, § 11352, subd. (a)) and his admissions that he previously had been convicted of a felony pursuant to the Three Strikes law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and had served two prior prison terms (Pen. Code, § 667.5, subd. (b)). The trial court sentenced Armstrong to nine years in state prison. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. Facts.

At approximately 5:00 p.m. on November 8, 2007, Los Angeles Police Officer David Hayden was working as an undercover narcotics officer near the intersection of Cedros and Parthenia Streets. Hayden was taking part in a “buy-bust operation” where several plain clothes officers go into an area and attempt to purchase narcotics. On this occasion, Hayden was the officer assigned the task of making the purchase. The other officers at the scene, referred to as cover officers, were there to keep Hayden safe and to observe the transaction, if one occurred. Uniformed officers also take part in a “buy-bust” scheme. Referred to as “chase officers,” they stay nearby ready to arrest anyone who takes part in a narcotics transaction.

On this particular day, Hayden, as the officer designated to make the purchase, was wearing a one-way wire so that the cover and chase officers could hear what was happening. While standing near the corner, Hayden saw Venice Mack walk out of a

nearby store.¹ Hayden approached Mack and asked her if she knew where he could find a “dub,” or \$20 worth of narcotics. Mack told Hayden that she would call her dealer for him and the two agreed that Hayden would give Mack \$10 for helping him. Hayden and Mack walked to some nearby pay telephones and Mack made a call. After hanging up, Mack told Hayden that the dealer was at the Food-4-Less store and that they could wait for him on Cedros. As the two walked toward Cedros, Hayden gave to Mack \$30 in pre-recorded currency. Mack then had Hayden sit with her between two parked cars until her dealer, Tyrone Armstrong, came into sight. At that point Mack got up, yelled “ ‘There he is,’ ” and ran across the street. A short time later, Mack called to Hayden who got up from between the parked cars and walked toward Mack. After Mack then handed to Hayden a baggie containing off white solids resembling rock cocaine, Hayden walked away from Mack and Armstrong and gave to the chase officers a pre-arranged signal indicating a transaction had taken place. Farther down the street, another undercover officer picked up Hayden. The two then drove by the area where Mack and Armstrong were being detained. Hayden identified Mack and Armstrong as the individuals who had sold him the narcotics. Hayden was of the opinion that Armstrong and Mack had sold him a “useable quantity of cocaine.”

Los Angeles Police Officer Porfirio Montejano was also working undercover that evening. After he observed Mack and Hayden leave the telephone booth and begin to

¹ Armstrong was tried with co-defendant Venice Mack. However Mack is not a party to this appeal.

walk down the street, Montejano followed them in an unmarked car. Montejano parked the car and stepped out onto the sidewalk as Mack ran across the street to meet Armstrong. Montejano stood approximately 10 feet from Mack and Armstrong and watched as Armstrong entered a nearby apartment building. As Montejano and Mack waited for Armstrong to return, they had a short conversation. Approximately five minutes later, Armstrong walked down the stairs and out onto the sidewalk. There, Mack handed to Armstrong several bills and, in exchange, Armstrong handed a “small item” to Mack. Mack, while holding the item in her closed fist, crossed the street and returned to where Hayden was standing. Armstrong continued to stand at the gate to the apartment building and Montejano, by way of his wire, directed uniformed officers to Armstrong’s location. Montejano, pretending to have a conversation in Spanish with someone on his cell phone, stayed at the location and monitored Armstrong until uniformed officers arrived and placed Armstrong under arrest. A search of Armstrong revealed \$35 in his jacket pocket. The serial numbers on some of the bills recovered from Armstrong matched those on the bills Hayden had given to Mack.

Stephanie Thomas is a Los Angeles Police Department criminalist. She analyzed the two items sold to Hayden by Armstrong and determined that the first item, or off-white, rock-like object, consisted of 0.41 grams of a substance containing cocaine base. The second item, or off-white “rock,” consisted of 0.04 grams of a substance containing cocaine base.

2. *Procedural History.*

Following a November 28, 2007 preliminary hearing, on December 11, 2007 an information was filed alleging Armstrong sold, transported or offered to sell cocaine in violation of Health and Safety Code section 11352, subdivision (a). It was further alleged that Armstrong had suffered two prior felony convictions within the meaning of the Three Strikes law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and had served two prior prison terms within the meaning of Penal Code section 667.5, subdivision (b). On February 15, 2008, it was determined the trial on the alleged substantive charge would be bifurcated from the trial on the alleged priors.

Prior to trial, Armstrong made a *Marsden*² motion requesting that his counsel be relieved and that new counsel be appointed. Armstrong complained that his counsel had neither brought the pre-trial motions he had suggested (a *Romero*³ motion and a *Pitchess*⁴ motion) nor provided him with a transcript of the preliminary hearing for which he had asked. Armstrong indicated that his counsel had failed to inform him of the number of witnesses who would be testifying against him or of her trial strategy. In essence, he believed she was not “doing everything in her power to represent [him] as best as she [could].”

² *People v. Marsden* (1970) 2 Cal.3d 118.

³ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

⁴ *Pitchess v. Superior Court* (1974) 11 Cal.3d. 531.

In her defense, counsel indicated that, although this otherwise would have been a third strike case, she had negotiated with the prosecutor to strike one of Armstrong's prior convictions. Accordingly, a pre-trial *Romero* motion was not necessary. As to the *Pitchess* motion, counsel did not believe one was necessary. Counsel believed there were no grounds on which to bring one and she was not going to file a motion she felt would have been frivolous.

Counsel had done a discovery motion and had received all the information she thought was necessary, including a transcript of the preliminary hearing which she was prepared to provide to Armstrong that day. Finally, counsel had spoken to Armstrong on numerous occasions, including by video conference, and had made certain that he was well aware of what was happening in his case. This included counsel's intention, should Armstrong be found guilty, to bring a *Romero* motion to have his second strike stricken.

The trial court denied Armstrong's *Marsden* motion after finding that his counsel was properly representing him. The trial court could see nothing improper about counsel's performance. Instead, the court found her to be highly experienced and believed that, if there was any kind of breakdown in communication, she would do her best to work with Armstrong.

After presentation of the evidence and while the jury was deliberating, Armstrong waived his right to a jury trial, his right to confront and cross-examine the witnesses against him, his right to present a defense and his privilege against self incrimination and admitted having previously been convicted of first degree burglary (Pen. Code, § 459)

within the meaning of the Three Strikes law and having served two prior prison terms within the meaning of Penal Code section 667.5, subdivision (b).

On February 21, 2008, the jury found Armstrong guilty of the sale or transportation of a controlled substance in violation of Health and Safety Code section 11352, subdivision (a) as alleged in count one of the information.

Prior to sentencing, counsel for Armstrong made a motion for new trial pursuant to Penal Code section 1118.1. The trial court denied the motion indicating there was “sufficient evidence” to submit the matter to the jury and that “short deliberations . . . do not indicate that the jury failed to deliberate.”⁵ The trial court also denied Armstrong’s counsel’s Penal Code section 1385 motion to strike the remaining prior Three Strikes conviction. The court indicated the 2004 conviction for first degree burglary was fairly recent and placed Armstrong within the spirit of the Three Strikes sentencing scheme.

The trial court sentenced Armstrong to the mid-term of four years in prison for his conviction of the sale or transportation of cocaine, then doubled the term to eight years pursuant to the Three Strikes law. With regard to the allegations he had previously served two prison terms, the trial court imposed one year for one of the terms and, due to the age of the term, stayed imposition of sentence for the second. In total, Armstrong was sentenced to nine years in prison. Armstrong was awarded presentence custody credit for 119 days actually served and 24 days of good time/work time, for a total of 143 days. The trial court ordered Armstrong to pay a \$20 court security assessment (Pen.

⁵ The jury apparently deliberated for only approximately 45 minutes.

Code, § 1465.8, subd. (a)(1)), a \$200 restitution fine (Pen. Code, § 1202.4, subd. (b)), a stayed \$200 parole revocation restitution fine (Pen. Code, § 1202.45), a \$50 lab fee (Health & Saf. Code, § 11372.5, subd. (a)) and \$35 in penalty assessments (Health & Saf. Code, § 11372.7, subd. (a)).

Armstrong filed a timely notice of appeal on March 5, 2008.

This court appointed counsel to represent Armstrong on appeal on June 3, 2008.

CONTENTIONS

After examination of the record, Armstrong's appellate counsel filed an opening brief which raised no issues and requested this court to conduct an independent review of the record.

By notice dated August 18, 2008, the clerk of this court advised Armstrong to submit within 30 days any contentions, grounds of appeal or arguments he wished this court to consider. Armstrong and his counsel were then granted an extension to October 13, 2008 to file a supplemental brief. However, no response has been received to date.

APPELLATE REVIEW

We have examined the entire record and determined that the abstract of judgment does not accurately reflect the imposition of fines and fees. Although the court orally imposed a lab fee of \$50 pursuant to Health and Safety Code section 11372.5, subdivision (a) and a \$35 drug program assessment pursuant to Health and Safety Code

section 11372.7, subdivision (a), these fees are not reflected on the abstract of judgment.

Accordingly, we shall direct the trial court to correct the errors.

We are satisfied Armstrong's counsel has complied fully with counsel's responsibilities. (*Smith v. Robbins* (2000) 528 U.S. 259, 278-284; *People v. Wende* (1979) 25 Cal.3d 436, 443.)

DISPOSITION

The judgment is affirmed. The trial court is directed to correct the abstract of judgment to conform to the oral pronouncement of judgment, including the assessments and fees imposed. A certified copy of the corrected abstract of judgment is then to be forwarded to the Department of Corrections.

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CROSKEY, Acting P. J.

We concur:

KITCHING, J.

ALDRICH, J.